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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 143

H. HENRY YOUNG,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The petitioner respectfully submits that the following comments must be addressed to the brief of the Government in opposition:

1. Among the arguments advanced by the Government to sustain the decision of the Court of Appeals for the First Circuit and to show that the decision is not in conflict with *United States* v. *Lester*, 247 F.2d 496 is the proposition that, because of the fact that the petitioner had counsel, the inquiry made pursuant to Rule 11 of the Federal Rules

of Criminal Procedure was adequate. While it is true that many of the cases arising under Rule 11 involve defendants who are unrepresented by counsel, there is nothing in the language of the rule or in the decided cases to suggest that the trial judge may make a less thorough inquiry if the defendant has a lawyer. Indeed, it has been held by the Court of Appeals for the First Circuit that the rule makes no exception in cases where the defendant has counsel. *Domenica v. United States*, 292 F.2d 483, 486.

In its brief the Government further argues that the cursory questioning of the petitioner prior to acceptance of the guilty plea met the requirements of Rule 11, because the petitioner had listened to an incomplete opening statement by the Assistant United States Attorney. The short answer to this line of reasoning is that neither Rule 11 nor any decision of the Federal Courts has any authority for the rather startling suggestion that the duty of the trial judge in accepting a guilty plea varies depending upon the stage of the trial at which the plea is entered.

In addition to the absence of legal authority, there are grave practical dangers in assuming that the incomplete Government opening informed the petitioner sufficiently. There is no doubt that after listening to Mr. Noonan's opening statement that the petitioner had a better idea of what the Government would try to prove, but can it be said that this opening made it certain that he fully understood the charges contained in an indictment which prints to thirty pages in the record? Having in mind the statement of Judge Waterman in *United States* v. *Lester*, 247 F.2d 496, 500 that "comprehension of the charge demands more than familiarity with the crime alleged", can it be said that a judge could be so certain that the petitioner understood this complex indictment that it became unnecessary to ask even one question directed to this issue?

Underlying the Government's reliance on the opening as

a means of informing the petitioner are two assumptions: (a) that the counts of the indictment mentioned in the opening properly charge a crime and (b) that if the Government were able to prove all the allegations in opening, the crime of concealing assets from the trustee would be established.

Petitioner respectfully submits that each of these premises is false for the reasons which follow:

(a) *From the opening statement it is clear that the indictment was improperly drawn.* Count 1 of the indictment charges that the petitioner concealed property valued at $1,000.00 belonging to the estate of the bankrupt Madison Drug Co., said concealment beginning on or about February 4, 1957 and continuing until September 8, 1960 when the trustee was dicharged. (G.R. 6-7).[1] Count 2 of the indictment charges the concealment of property valued at $2,000.00 from the trustee of Madison Drug Co., said concealment beginning on or about April 8, 1957 and continuing until the trustee was discharged. (G.R. 7).

Both counts allege that a trustee in bankruptcy for Madison Drug Co. was appointed on June 4, 1957; that is, the appointment followed the dates on which the two offenses allegedly began (G.R. 6-7).

From the opening statement of the Assistant United States Attorney the petitioner learned that the concealment charged in Count 1 allegedly arose out of some proceeds *he got from the Madison Drug Co. operations for the period* February 4 to February 26, 1957 (D.R. 50). The petitioner was further told that the concealment alleged in Count 2 arose out of proceeds from an auction sale of Madison inventory on April 8, 1957.

It can be concluded, therefore, from the indictment and the opening that the Government charged two separate and

[1] References to "D.R." are to the Record Appendix filed by the petitioner, and references to "G.R." are to respondent's Record Appendix.

distinct offences occurring on two occasions when the petitioner allegedly received some money from the Madison Drug Company.

Since the crime of concealing assets from a trustee in bankruptcy cannot be committed until a trustee has been appointed, all transfers prior to the appointment, if they do in fact constitute concealments, become one single offense as of the date that the trustee is appointed. *Edwards* v. *United States*, 265 F.2d 302, 306. The practice of including a separate count for each transfer, as was done in the case at bar, was disapproved in the *Edwards* case. A proper indictment would have to charge that all transfers to the petitioner prior to June 4, 1957, the date of the trustee's appointment, constitute one offense.

Further, it cannot be argued that this needless multiplication of offenses was harmless error, for separate fines were imposed on counts one and two.

(b) *Even if all the matters alleged in the opening were proved, no crime under Title 18 United States Code, section 152 would be established.* During various parts of the opening it was alleged that the petitioner received sums of money from the Madison Drug Company. Although no precise amounts were mentioned in the opening, a careful anaylsis of the record leads to the conclusion that the amount allegedly received by the petitioner was no more than $6500.00 (G.R. 50-54). It is also mentioned that the petitioner, through a corporation, was the holder of a recorded first mortgage on the assets of Madison in the sum of $8990.00 (D.R. 48-49).

There is a well settled distinction between concealing assets from a trustee (a criminal offense) and the giving of a preference to one creditor over another (a civil bankruptcy matter). *United States* v. *Alper*, 156 F.2d 222. Since neither the indictment nor the opening contain any allegations that the petitioner received an amount from

Madison in excess of the first mortgage, this case is governed by *Alper*, where it was held a secured creditor can be guilty of concealing assets only to the extent that he receives money or property in excess of his secured claim.

The preceding discussion has ignored the further allegation in the opening that the petitioner received a mortgage for $8,900.00 but gave only $2,200.00 as consideration. Petitioner respectfully submits that this matter, even if established, constitutes a voidable security interest which could be set aside or diminished by appropriate proceedings in the bankruptcy court. No criminal sanctions are imposed under section 152 for receiving a secured claim without adequate consideration.

As another means of justifying the Rule 11 inquiry in the case at bar, the Government points to the fact that the clerk described counts 1, 2 and 22. Factually it cannot be said that clerk's capsule description of the three complex counts [2] could add anything to the petitioner's understanding of the charges to which he was pleading guilty. And as a matter of law there is nothing to sustain the proposition that the clerk may discharge the duty imposed on the judge by Rule 11. See *Domenica* v. *United States*, 292 F.2d 483, 486.

2. In its brief the Government attempts to minimize the significance of *Dandridge* v. *United States*, 356 U.S. 259, by making a factual distinction between the chronology of the illness in *Dandridge* and the illness in the case at bar. Since the *per curiam* opinion of this court in *Dandridge* is based upon the confession of error by the Solicitor General, the holding of that case must lie in the nature of the error confessed, rather than in the precise factual situation.

The vital error which the Government acknowledged in *Dandridge* was the failure of the District Court and the

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[2] The clerk did not mention the dates of the alleged offenses or the nature and value of the assets allegedly concealed. (G.R. 56)

Court of Appeals to make specific findings as to the mental condition of the accused at the time his guilty plea was entered. See memorandum for the United States on writ of certiorari, *Dandridge* v. *United States*, No. 609, Oct. term, 1957.

In both the case at bar and in the *Dandridge* case, the District Court made no express finding on the question of the accused's mental competance when he pleaded guilty. The Court of Appeals in *Dandridge* v. *United States*, 247 F.2d 105 found that there was "no abuse of discretion." In the case at bar the only portion of the opinion of the Court of Appeals that could be related to the issue of mental competence is the general finding that "(t)hat there is nothing whatever to show that the defendant's change of plea was not made voluntarily and with knowledge of its consequences. . . ."

Is the passage from the decision of the Court of Appeals quoted above specific enough to be indistinguishable from the general finding which was disapproved by this Court in *Dandridge?*

The petitioner respectfully submits that the answer to this question presents issues of procedural due process and issues so vital to the administration of criminal justice in the federal courts that certiorari should be granted.

Respectfully submitted,

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